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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 492

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

STATE OF OKLAHOMA EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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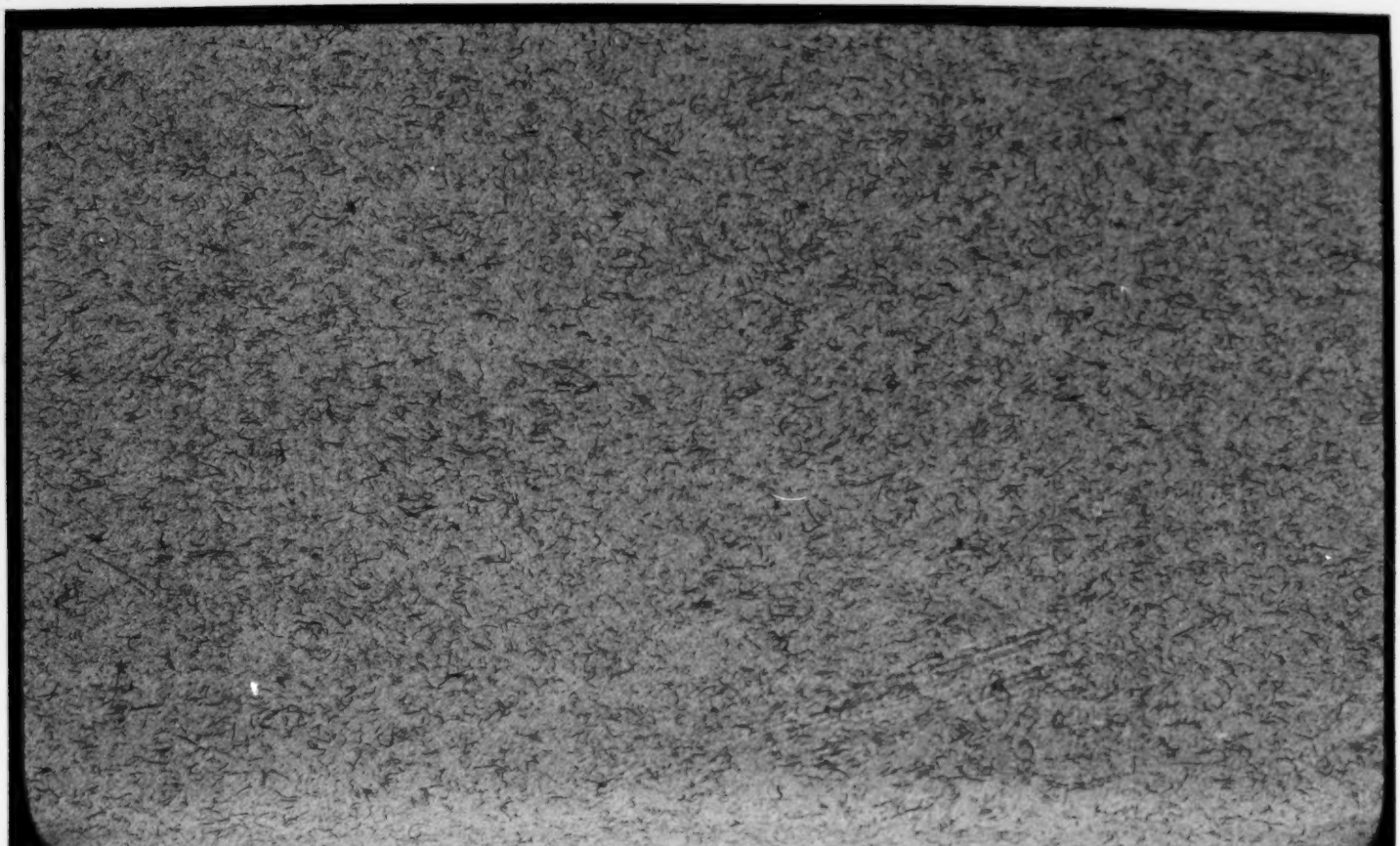

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vs.

STATE OF OKLAHOMA EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Your petitioner above named respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 20th day of October, 1949, affirming a judgment theretofore entered in favor of respondents in the United States Court of America in and for the Northern District of Oklahoma, in an action to quiet title to land situated in Pawnee County, Oklahoma.

Opinions Below

The findings of fact and conclusions of law of the trial court are embodied in the transcript (R. 19). The opinion

of the Court of Appeals is also shown in the transcript (R. 29). It is not as yet shown in the Federal Reporter.

Jurisdiction

The judgment of the Court of Appeals was entered on the 20th day of October, 1949, and petitioner did not file a petition for rehearing, but has filed this petition for certiorari within the time allowed by law.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as Amended by the Act of February 13, 1925. Title 28, U. S. Code, Sec. 1254. See also Rule 12, p. 9, Revised Rules of the United States Supreme Court.

Federal and State Statutes Involved

Organic Act creating the Territory of Oklahoma, May 2, 1890 (26 Stat. 81).

Act of Territorial legislature of 1893 (Article IX, Ch. 17, Sec. 9, Oklahoma Statutes of 1893).

Territorial Act approved March 8, 1895 (Chapter 24, Eminent Domain, p. 122, Session Laws of the Territory of Oklahoma, 1895). Chap. 34, Sec. 1-3, Revised and Annotated Statutes of Oklahoma, 1903.

Act of Congress of June 26, 1906 (34 Stat. 481, 43 U. S. C. A., Sec. 944).

Statement of Case

Petitioner is the successor in interest of the Missouri, Kansas and Oklahoma Railroad Company. That company in the year of 1904, while the laws of the Territory of Oklahoma were in force, brought a proceeding to condemn lands for railroad purposes, pursuant to an act of the General Assembly of the Territory of Oklahoma, approved March 8, 1895, entitled "An Act making Territorial public lands subject to the exercise of the power of eminent domain," hereinafter quoted.

The controversy is over the ownership of the oil and gas and other mineral rights underlying a strip of petitioner's right of way, thus acquired, over and across the fractional one-half of Section 36, Township 20 North, Range 6 East, Pawnee County, Oklahoma, which section was by the Organic Act, creating the Territory of Oklahoma, designated as a part of the school lands of the future State of Oklahoma (R. 17). Petitioner claims the title in fee to the area (24.46 acres) embraced in the said strip of land, but the Court of Appeals and the trial court held that petitioner acquired an easement right only, and not a fee simple title, by virtue of the said condemnation proceedings. The plaintiffs in the trial court claimed ownership of an oil and gas lease, dated May 27, 1946, purporting to include petitioner's right of way in the Southwest Quarter of Section 36, which said lease was executed by the Commissioners of the Land Office of the State of Oklahoma (R. 2). Plaintiffs sued to quiet title as to said lease as against petitioner and others. The Commissioners of the Land Office came into the case and asserted title to the mineral rights, claiming that petitioner's predecessor had acquired nothing more than an easement by virtue of the condemnation proceedings. Cox and Hamon, who had taken a lease from the petitioner, disclaimed before the case came to trial in the court below. The case was also dismissed as to the members of the Corporation Commission.

The contestants in the Court of Appeals were the petitioner, on one side, and the Commissioners of the Land Office, on the other.

The Honorable T. B. Ferguson, while Governor of the Territory of Oklahoma, on March 28, 1904, named appraisers, in compliance with the act of 1895, and waived notice of the time and place for the making of said appraisement (R. 14-16). A report was duly made to the Governor by the persons appointed to appraise the land, and the ap-

praisement shows that they found the value of the land taken and appropriated, comprising 24.46 acres, to be $220.00, including all damages (R. 16-18). The Two Hundred Twenty Dollars was paid to the Territorial Treasurer as shown by receipt of the Secretary of the Board of the School Land Department, other lands not here material being included in the receipt (R. 19). The official title under which the Land Office operates since statehood is Commissioners of the Land Office. Art. 6, Sec. 32, Constitution, (Oklahoma Statutes 1941, 61). Though called School Land Department in the territorial days, the functions are the same. They rent the school lands sections (16 and 36) and loan out the money that has accumulated in that fund.

The Court concluded as a matter of law that the interest of the petitioner in its right of way acquired by condemnation in 1904, prior to Oklahoma Statehood, was limited to an easement for right of way purposes over and across said hereinbefore described land, and the petitioner has no interest in the minerals in and under its said right of way, the fee title to said property being in the State of Oklahoma subject to petitioner's right of way.

For findings of fact and conclusions of law made by the trial court, see R. pp. 19-23.

Questions Presented

I

Whether the original condemnation proceeding resulted in giving petitioner a fee simple title, or only an easement.

II

Whether the Act of Congress of June 26, 1906, 34 Stat. 481, 43 U. S. C. A. 944, operated to vest petitioner with a fee simple title, though the original condemnation proceedings may have been defective.

III

Whether the adoption of the Territorial laws and the schedule to the State Constitution operated to vest petitioner with fee simple title.

IV

Whether the Commissioners of the Land Office are now estopped to dispute the title of petitioner.

Reasons for Granting the Writ

Our reasons for a reversal are stated as follows, to-wit:

1. The ruling of the Court of Appeals incorrectly interprets the Organic Act, creating the Territory of Oklahoma, and the Act of the General Assembly, approved March 8, 1895, conferring rights of eminent domain upon common carriers.

2. The Circuit Court of Appeals has misinterpreted the Act of Congress of June 26, 1906, (34 Stat. 481) ratifying and confirming railroad rights of way in the Territories of Arizona and Oklahoma.

3. Upon the coming of statehood the laws of the Territory were adopted and carried forward, and the schedule to the Constitution preserved and vitalized the rights of petitioner in the condemned area.

4. The Commissioners of the Land Office are estopped from questioning the title of petitioner, for the reason that they have received in money the full value of the lands taken in the condemnation proceedings and have held and used the same through a period of over forty years.

BRIEF

I

The Ruling of the Court of Appeals Incorrectly Interprets the Organic Act, Creating the Terrritory of Oklahoma, and the Act of the General Assembly, Approved March 8, 1895, Conferring Rights of Eminent Domain upon Common Carriers.

The Organic Act, passed by Congress and approved May 2, 1890 (26 Stat. 81), in outlining the scope of the legislative authority of the newly created Territory of Oklahoma, reads in part as follows:

> "That the legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; * * *."
>
> —Sec. 6, p. 11, Okla. Stat. 1941.

Following the Organic Act, above quoted, the General Assembly of the Territory in 1893 enacted a statute (Sec. 9, Art. IX, Ch. 17, Statutes of 1893) as amended by session laws of 1901, authorizing railroads to make surveys of lands proposed to be taken and (quoting from the statute):

> "To hold real estate; to take and hold such voluntary grants of real estate and other property within or without this Territory as may be made to it; to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only."
>
> —Sec. 9, Session Laws 1901, pp. 82-83.

Following and supplementing the above acts the General Assembly passed the Act of March 8, 1895 (Chapter 24,

Eminent Domain, p. 122, Session Laws of Oklahoma Territory of 1895). It provides:

"Sec. 1. That the lands set apart for the use and benefit of the Territory of Oklahoma for public schools, for public buildings and educational institutions, either by congressional enactment or executive reservation, are hereby declared to be subject to the right of eminent domain in behalf of any of the public enterprises now authorized by law to condemn private property for mills, sewers, railroads, side tracks, station-grounds and other municipal or corporate public uses, and all of the laws of this Territory with reference to the taking of private property for public use are hereby made applicable to the said lands.

"Sec. 2. Before any public corporation, municipality or other entity or person authorized to exercise the right of eminent domain under existing law, shall have the right to condemn or take any part of such lands, a plat of the grounds proposed to be taken, showing the part of the particular sub-division, shall be prepared and filed with the governor of said Territory, together with a sworn statement of the engineer or superintendent in charge of such public work, that the taking of such lands is necessary to the exercise of the powers of such municipality or corporation; and it shall be the duty of the governor to appoint three disinterested persons, resident householders of the county in which such land is located, who shall first take an oath to fairly and impartially appraise the value of the ground so taken, and the damage to the remaining parts of such sub-division by the taking thereof, and the said appraisers shall notify the governor and the officers of such corporation of the time and place when they will proceed to appraise such damage, and at such time and place, upon actual view of the premises, the said appraisers shall meet and appraise the damage, in writing, and return one copy thereof under their signatures to the governor of the Territory, and one copy to the principal officer of such corporation or

municipality in charge of such construction, and if either party is aggrieved they may, within ten days, appeal to the district court of the county where such land is located, in the same manner that appeals are taken from judgment of justices of the peace, where the amount of such damage shall be tried by a jury, as other causes are tried. In case no appeal is taken from the award of such appraisers, such corporation or municipality shall have the right to occupy such grounds by the paying into the Territorial treasury the amount of such award. In case either party appeals, such corporation or municipality shall have the right to occupy such grounds upon giving bond in treble the amount of the award, with sureties to be approved by the clerk of the district court where such appeal is pending, to the effect that the corporation or municipality will pay said award if such appeal be dismissed, or shall pay any judgment finally rendered in said action if the same shall be tried.

* * * * * * *

"Sec. 4. This act shall be in force and take effect from and after its passage and approval.

"Approved March 8, 1895."

The foregoing are the enactments, pursuant to which petitioner acquired title to the area in controversy. It is petitioner's position that it acquired a fee simple title, subject only to reverter in case of abandonment. It will be noted that under the Territorial laws the rights to be acquired by condemnation under the eminent domain statutes as to public school lands and as to privately owned lands are identical.

The Supreme Court of Oklahoma has definitely construed the act of the General Assembly of 1893, supra, as being a statute which, when invoked, gave to the condemnor a title in fee, and not an easement. *Jones* v. *Oklahoma City*, 192 Okl. 470, 137 P. 2d 233.

The Oklahoma Supreme Court has likewise construed the words of the Organic Act, stating that the words "no law shall be passed interfering with the primary disposal of the soil" meant that the Territory could not pass any laws which would interfere with the government of the United States in disposing of its title to public lands. *Jones* v. *Oklahoma City, supra.*

It is to be noted that the general condemnation laws as shown in the act of 1893 were made applicable to public lands by the act of 1895, hereinabove mentioned. It is pointed out in the *Jones* case that the Territorial statute of 1895 was taken from the state of South Dakota, and the Supreme Court of South Dakota said that the legislature intended to authorize the granting of a fee simple title. *Sherman* v. *Sherman,* 23 S. D. 486, 122 N. W. 439. That construction placed upon the statute by the South Dakota court was expressly approved by the Oklahoma court in the *Jones* case. The Supreme Court of Oklahoma also said that the words "take and appropriate" meant the taking of a fee. The Oklahoma court further said that a conveyance to a railroad of land "for a right of way for a railroad track," but not otherwise limited, conveyed a fee. *Marland* v. *Gillespie,* 168 Okl. 376, 33 P. 2d 207; *Cobb* v. *Wiedemann,* 170 Okl. 493, 40 P. 2d 1075.

The Court of Appeals in considering the Organic Act and the Act of 1895, placed too much reliance upon the case of *Territory* v. *Choctaw, O. & W. Ry. Co.,* 20 Okl. 663, 95 Pac. 420, treating it as the controlling case upon the point here presented. In the *Choctaw Railway* case the Oklahoma court simply held that the railroad company had no title to sections 16 and 36 and therefore could only recover the rental value of the land taken. The precise question as to the title to be acquired under Territorial laws by the railroad in the condemnation proceedings, whether a fee or easement, was not involved or decided.

The Supreme Court of Utah in *United States* v. *Elliot*, 7 Utah, 389, 26 Pac. 1117, correctly stated the law under a very similar state of facts. It was there held that when school lands (Sections 16 and 36) were surveyed the title of the Territory became complete, so that the Territorial laws would apply, and the lands reserved ceased to be public lands open to settlement. This case cites a ruling of this Court. *Minn.* v. *Bachelder*, 1 Wall. 109-116, 68 U. S. 109, 17 L. Ed. 551. Homesteaders on public lands prior to the issuance of final patent, had such an interest in the lands to be later acquired as to grant to railroads rights of way over public lands. *Minidoka and S. W. Ry.* v. *Utah Construction Co.*, 235 U. S. 211, 59 L. Ed. 200.

The Court of Appeals, placing great reliance on *Territory* v. *Choctaw, O. & W. Ry.*, 20 Okl. 663, 95 Pac. 420, thought that the Territory had no title to the school lands and therefore the condemnation proceedings failed for want of a necessary party. But we respectfully differ with the court and point out that this Court has recognized the equities of homesteaders in public lands, though title be vested in the United States. *Oury* v. *Goodwin*, 3 Ariz. 555, 26 Pac. 376; *Minidoka and S. W. Ry.* v. *Utah Construction Co.*, 235 U. S. 211, 59 L. Ed. 200. Undoubtedly the Territories had some equitable rights in Sections 16 and 36 at the time of the passage of the Act of 1895, under which this condemnation was consummated. The naked legal title may have been in the United States, but the equitable title to these lands was in the Territory of Oklahoma. The general principle of equity is that a vendee under an executory contract is the owner of the land. 2 Pom. on Equity Jurisprudence 5th Ed., 216, Sec. 368. The Territory of Oklahoma was in possession of the land. The Territorial legislature of Oklahoma had some type of jurisdiction over these lands. They were a part of the domain assigned to the Territory and would ultimately become lands of the state.

So that it seems to us that the general principles of equity jurisprudence operate to vest in the Territorial legislature some type of plenary powers, certainly with reference to improvements that are calculated, such as railroads, to enhance the value of the land and promote the common welfare of the people to whom the lands would finally be assigned or conveyed by the United States. The Organic Act of the Territory placed only one limitation on the legislative powers of the General Assembly. That had to do with "primary disposal of the soil." We discuss what would be "primary disposal of the soil," as contemplated by the Organic Act, in another section of this brief.

It is our view that the Territorial statutes referred to were the only law under which petitioner's predecessor might have proceeded to acquire by eminent domain the right of way over said school lands. The Act of March 3, 1875, granting to railroads a right of way over and across the public lands or public domain was inapplicable because when these sections were by the Organic Act segregated as school lands for the future state, they ceased to be a part of the public domain or public lands covered by the Act of March 3, 1875. *Wilcox* v. *Jackson*, 13 Pet. 498; *U. S.* v. *Elliot* (Sup. Ct. Utah) 25 Pac. 1117. See Sec. 5, Act of March 3, 1875, providing that the first four sections of said act shall not apply to lands especially reserved from sale.

The Enid and Anadarko Act of February 28, 1902 (32 Stat. 50) was also inapplicable as the general sections of that act applied only to condemnation of lands in the Indian Territory.

We submit that under the Organic Act, supplemented by the Territorial Acts of 1893 and 1895, supra, the result was to vest petitioner with title in fee to the disputed area.

We next direct attention to the validating act of 1906, passed by Congress just before statehood for Oklahoma.

II

The Circuit Court of Appeals Has Misinterpreted the Act of June 26, 1906 (34 Stat. 481, 43 USCA Sec. 944) Ratifying and Confirming Rights of Way in the Territories of Arizona and Oklahoma.

Even if it be true that the condemnation proceedings were defective because the United States was not a party, nevertheless the Act of June 26, 1906, supra, was designed to validate and confirm whatever rights were originally sought to be accomplished, either in condemnations conducted under the Act of March 3, 1875, or under special acts of Congress, or under acts of the Territorial legislatures. The Act of 1906 reads:

> "An Act to confirm the right of way of railroads now constructed and in operation in the Territories of Oklahoma and Arizona.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An Act granting to railroads the right of way through the public lands of the United States,' or under special Acts of Congress, or under the laws of the Territories of Oklahoma and Arizona, railroads have been constructed and are now in operation in Oklahoma or Arizona which may pass through any of the lands heretofore reserved for said Territories, such lands shall be disposed of subject to such railroad right or easement, but only to the extent of the right of way conferred by the said Act of March third, eighteen hundred and seventy-five, for such railroad purposes.
>
> "Approved, June 26, 1906."
>
> See 43 U. S. C. A., Sec. 944, 34 Stat. 481.

It is significant that this act was passed a few days following the approval of the Enabling Act by which Oklahoma became a state (Act of June 16, 1906, 34 Stat. 267). Obviously, there was in the legislative mind three types of railroad rights of way, namely, (a) rights which were acquired under the Act of March 3, 1875 (18 Stat. 482, 43 U. S. C. A. 934); (b) rights where acquired under Special Acts of Congress; and (c) rights where acquired under the laws enacted by the General Assemblies of the Territories of Oklahoma or Arizona. Clearly, the Congress had in mind not simply easements, but had greater estates of some type, as the act says "railroad right or easement."

Black's Dictionary, Third Edition, p. 395, thus defines the word "confirm": "To complete or establish that which was imperfect or uncertain; to ratify what has been done without authority or insufficiently." This Court has said that a legislative confirmation is a recognition of the validity of the claim and operates as effectually as a grant or quit claim from the Government. *Langdeau* v. *Hanes*, 21 Wall. 521, 88 U. S. 531, 22 L. Ed. 646; *Sanchez* v. *Deering*, 298 F. 286. We think the learned author of the opinion in the lower court failed to give proper weight to these decisions.

We feel that the Court of Appeals misinterpreted the qualifying words "only to the extent of the right of way conferred by said Act of March 3, 1875, for such railroad purposes." The quoted language, in our opinion, has reference to areas, physical boundaries, and limitations as to how much land could be taken on each side of the track and how much for depots, etc., and was not used to qualify the character of the estate held by railroads. That physical boundaries were in the legislative mind is clear when reference is had to the phraseology found in other acts of Congress and in the Act of March 3, 1875, itself. The words "to the extent of 100 feet on each side of the

central line of said road"; "to the extent of one station for each 10 miles of its road"; and "also the right to take, from the public lands adjacent to the line of the road, material, earth, stone and timber necessary for the construction of said road"; also "ground adjacent to the right of way for station building, depots, machine shops, side tracks, turn-outs, not to exceed 20 acres for each station, etc.," all found in the Act of March 3, 1875, refer to areas or physical conditions. Thus it appears that in the reference in the Act of 1906 to the general act of 1875 the Congress had in mind, when employing the words "only to the extent" not the type of the estate, whether easement, fee, or limited fee, but had in mind those areas or the acreage a railroad could claim by virtue of its right of way through public lands. In providing, as the Congress did, that "such lands shall be disposed of subject to such railroad right or easement," the Congress, in our opinion, placed a limitation upon future sales of said lands so as to make them subject to these railroad rights of way or strips of land. The purpose was to place a limitation on area so as to conform to the specifications of the Act of March 3, 1875. We feel that the learned Court of Appeals gives no effect to the word "right" found in this act, but that word is in the act and is used along with "easement." It should be given some meaning. The existence of the Act of 1895, passed by the Oklahoma Territorial legislature, must have been known to Congress in 1906. It is reasonable to assume that the Congress intended to validate and confirm the rights of railroads attempted to be acquired under the 1895 act.

We direct attention to another act of Congress, passed before statehood. The so-called Enid and Anadarko Act, passed by Congress in 1902 (32 Stat. 433), authorizing a right of way between Enid and Anadarko, carried general provisions (Sections 13 to 23, both inclusive) which laid down a uniform pattern for future railroads in the Indian

Territory. There the Congress outlines what areas a railroad may take, limiting the width of the road on each side of the track, the amount of ground that can be taken for stations, side tracks, roundhouses, etc. These limitations all relate to physical areas and show that Congress wanted to provide just what land could be taken by condemnation insofar as the quantity of extent of the land taken was concerned.

The words "to the extent of the ground occupied" appears in an act of Congress, dealing with the right of way of a canal. Act of March 3, 1891, c 561, sec. 18, 26 Stat. 1101. In many railroads authorized by Congress in the Territories, Congress provided that blue prints and maps be filed, showing width of roadbeds, depot grounds, roundhouses, etc. For illustration, see Fort Smith and Western Ry. Act, 31 Stat. 182. Moreover, if the Congress had intended to deal with and limit the character of the estate acquired, it would have been a simple matter for the Congress to have said "only to the extent of an easement," thereby definitely limiting the title or estate to something less than a fee; but the use of the word "right" along with "easement," in our opinion conclusively indicates that the Congress knew that under one class of railroads, namely, railroads created under the Oklahoma Territorial Act, something more than easements were attempted to be given.

In *New Mexico* v. *United States Trust Co.*, 172 U. S. 181, 43 L. Ed. 411, this Court said:

> "The term 'right of way' has a two-fold significance. It sometimes is used to mean the mere intangible right to cross—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use and upon which it builds its roadbed."

Again in this opinion in discussing the words "right or easement" this Court said:

> "'Whenever a grant is made of a "right or easement" in lands which fall within the class sometimes described as "non-continuous"—that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land—the reasonable interpretation is, that an easement in the soil, and not the fee, is intended to be conveyed. Among the most prominent of this class of easements is a way.' An ordinary way, of course, the court meant, one the use of which would be non-continuous—only intermittent and occasional; but a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land, might require the fee for its enjoyment—certainly would require more than a mere right of passage. 'Unlike the use of a private way—that is, discontinuous—the use of land condemned by a railroad company is perpetual and continuous.' New York S. & W. R. R. Co. *v.* Trimmer, 53 N. J. L. 3."

We again respectfully differ with the conclusion of the Court of Appeals in the statement made in the opinion that at the time the Act of 1906 was passed the consensus of judicial opinion was that only easements were granted by the Act of March 3, 1875. It is our understanding that the cases by many courts had, up until the ruling by this Court (1942) in the case of *Great Northern Railway* v. *United States,* 315 U. S. 262, 62 S. Ct. 529, 86 L. Ed. 836, held that the railroads constructed pursuant to the Act of March 3, 1875, acquired a fee title, conditioned only upon the continued operation of the railroads. *Stepan* v. *Northern Pac. Ry.* (Mont.) 263 Pac. 425; *Joy* v. *St. Louis,* 138 U. S. 1, 34 L. Ed. 843, 11 S. Ct. 256; *New Mexico* v. *United States Trust Co.,* 172 U. S. 171, 43 L. Ed. 407, 19 S. Ct.

128; *Rio Grande Western Ry.* v. *Stringham,* 239 U. S. 44, 60 L. Ed. 36, 36 S. Ct. 5. For other cases see brief of counsel for Great Northern in the *Great Northern* case. The question was not settled until the Court handed down this opinion in the *Great Northern* case.

We therefore feel that the Court of Appeals was in error, and that contrary to statement of the Court of Appeals, when this act was passed in the year of 1906 it was almost universally assumed that a limited fee had been acquired by railroads that had been constructed under the act of 1875.

This Court will take judicial notice of the condition that obtained in the Oklahoma Territory in 1895. The Territory had been open to settlement some five years and a great influx of people had established homes; railroads were being projected through many areas of the Territory; and the Congress was giving its encouragement to the construction of these roads. With these facts before Congress, it saw fit to place no limitations upon railroads insofar as the school lands were concerned. The public lands throughout the United States were being subjected to the provisions of the Act of 1875.

To sum up: The Confirming Act of 1906, supra, was a legislative recognition and confirmation of that type of title that the Supreme Court of Oklahoma said in *Jones* v. *Oklahoma City* had passed to the condemner under the territorial acts, to-wit, a fee. The Act of 1895 must have been in the minds of the authors of this Congressional legislation in 1906; else why refer to acts of the Territories authorizing the construction of railroads.

III

Upon the Coming of Statehood the Laws of the Territory Were Adopted and Carried Forward, and the Schedule to the Constitution Preserved and Vitalized the Rights of Petitioner in the Condemned Area.

Sections 1 and 2 (Schedule to the Constitution of Oklahoma) Art. XXV, Okla. Stat. 1941, p. 108, read as follows:

> "No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. And all processes which may have been issued previous to the admission of the State into the Union under the authority of the Territory of Oklahoma or under the authority of the laws in force in the Indian Territory shall be as valid as if issued in the name of the State.
>
> "All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

The particular statute invoked by petitioner's predecessor was adopted and made effective by the second section above mentioned to the same extent as if that law had been reenacted by the legislature. *St. Louis & S. F. Ry.* v. *Cross,* 171 F. 483; *Quick* v. *City of Fairview,* 144 Okl. 231, 291 Pac. 95; *Ramsey* v. *Leeper,* 168 Okl. 43, 31 P. 2d 583. The state school lands became by virtue of the provisions of the Enabling Act properties of the State of Oklahoma. All reserved rights theretofore held in abeyance by the United States passed to the state when it became a part of the union of states on November 16, 1907. The very statute invoked by petitioner's predecessor in interest was carried

forward as a part of the laws of the newly created state. The petitioner had something in the nature of a definite property right. If it be true that the title to the school lands was not in the Territory to the extent that the Territorial legislature could apply the laws of eminent domain, that obstacle did not obtain after November 16, 1907, when the Territory was merged into a State, but the Constitution of Oklahoma recognized these lands as a part of the public domain acquired by the new state. Having adopted the laws of the Territory pursuant to which the instant condemnation was had, and having retained the money paid by the railroad company for a title in fee, it would seem to us that these provisions of the schedule to the Constitution of themselves operated to vest in the railroad company a title in fee. Whatever rights the petitioner had under the condemnation proceedings conducted in 1904 were preserved and carried over when the Territory was merged into the State.

IV

The Commissioners of the Land Office Are Estopped from Questioning the Title of Petitioner, for the Reason That They Have Received in Money the Full Value of the Lands Taken in the Condemnation Proceedings and Have Held and Used the Same Through a Period of Over Forty Years.

It is our position that the doctrine of estoppel applies in this case. We respectfully disagree with the learned Court of Appeals in the statement made to the effect that this is not a proprietary but an administrative function. The Governor of the Territory himself was a party to the proceedings and caused an appraisement to be made (R. 16-18). That appraisement took into consideration the value of the land, the taking and the appropriating of the land, all of which was said in the *Jones* case to amount to

the taking of the fee. The money paid the Territory of Oklahoma was carried into the account of the School Land Department, and under the Constitution of the State the present Commissioners of the Land Office, as successors, hold that money and have held it for more than forty years. In *Jones* v. *Oklahoma City, supra,* the court said that a condemner stood in the same shoes as a grantee in a deed. The railroad company obviously was acting in good faith and invoked a statute passed by the Territorial legislature when it proceeded under the eminent domain statute. The sum of $220.00 was paid to the office of the Territory. That money became a part of the fund on which common school facilities were provided for the children of the Territory, and which, after statehood, was used for the maintenance of the common schools of the State of Oklahoma. The doctrine of estoppel where a state acts in a proprietary capacity, has been applied in many cases. Corpus Juris, Vol. 21, p. 1186; Amer. Jurisprudence, Vol. 19, p. 819; *New Mexico* v. *Texas,* 275 U. S. 279, 72 L. Ed. 280; *United States* v. *Willamette Valley & C. M. Wagon-Road Co.,* 54 F. 807; *Woodruff* v. *Trapnal,* 10 How. 190.

If individuals were before a court of equity, the doctrine of estoppel would undoubtedly be applied in this case, for the reason that, as the facts exist, all of the elements of estoppel are present. If a legal impediment existed at the time of the condemnation, the equities are nevertheless the same. The money of the railroad was taken by the officers of the Territory. That money was retained by the Commissioners of the School Land Department.

The Court of Appeals cites *Goodwin* v. *Commissioners of the Land Office,* 174 Okl. 364, 50 P. 2d 189; *Board of County Commissioners* v. *Commissioners of the Land Office,* 125 Okl. 287, 257 Pac. 779; and *United States* v. *Fuston* (10th Circuit) 143 F. 2d 78, on the point that the Commissioners of the Land Office functioned in an administra-

tive capacity and not a proprietary capacity. We respectfully suggest that these cases do not support that view. *United States* v. *Fuston* does say that the Commissioners acted in a governmental capacity, but the case goes on to hold that since the state could not be sued, the woman whose land was involved was likewise not bound by the statutes of limitation of the state. In the other two cases, the Oklahoma court merely makes the observation that the School Land Commissioners function in a governmental capacity. We think the correct principle, supported by numerous authorities, is stated in a Washington case:

> "It is the accepted rule that a state acts in its proprietary capacity when it undertakes to dispose of public lands. This rule has been recognized almost since the inception of the principle of equitable estoppel. United States *v.* California & Oregon Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354; United States *v.* Dalles Military Road Co., 148 U. S. 49, 13 S. Ct. 465, 37 L. Ed. 362; United States *v.* Willamette Val. & C. M. Wagon-Road Co., C. C., 54 F. 807; State of Michigan *v.* Jackson, L. & S. R. Co., 6 Cir. 69 F. 116; United States *v.* Stinson, 7 Cir., 125 F. 907; State of Iowa *v.* Carr, 8 Cir., 191 F. 257; Attorney General *v.* Central R. Co., 68 N. J. Eq. 198, 59 A. 348; State *v.* Flint & P. M. R. Co., 89 Mich. 481, 51 N. W. 103; State *v.* Livingston, 164 Iowa 31, 145 N. W. 91; State *v.* Cording, 101 Neb. 243, 162 N. W. 652; Crosbie *v.* Partridge, 85 Okl. 186, 205 P. 758; State *v.* Horr, 165 Minn. 1, 205 N. W. 444; State ex rel. Shell Oil Co. *v.* Register of State Land Office, 193 La. 883, 192 So. 519."
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> —Strand *v.* State, 132 P. 2d 1016.

The court in the above case cited *United States* v. *Willamette Valley and C. M. Wagon-Road Co.*, 54 F. 807. In the *Willamette Valley* case the court used the following language:

> "No good reason can be offered why the United States, in dealing with their subjects, should be un-

> affected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground than that of laches. It is held that laches is not imputable to the government upon grounds of public policy."

Again the court said:

> "It is well said in Woodruff *v.* Trapnel (U. S. Supreme) that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

WHEREFORE, for the reasons hereinabove set forth, your petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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